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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STANDARD FRUIT COMPANY,
STANDARD FRUIT AND STEAMSHIP COMPANY,
and CASTLE & COOKE, INC.

Petitioners,

v.

REPUBLIC OF NICARAGUA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners Standard Fruit Company ("Standard Fruit"), Standard Fruit & Steamship Company ("Steamship"), and Castle & Cooke, Incorporated ("Castle & Cooke"),[1] herein reply to the arguments of Respondent Republic of Nicaragua ("Nicaragua") set out in its Brief in Opposition to the Petition for Writ of Certiorari ("Nic. Br.").

Nicaragua's efforts to minimize the Ninth Circuit's radical departure from precedent in this Court, and its divergence from the holdings of other circuit

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[1] Pursuant to Supreme Court Rule 29.1, Petitioners reference the currently accurate corporate information contained in the original Petition for Certiorari at p.5, n.1.

courts, are unavailing. The Ninth Circuit's *de novo* review of factual findings by the district court, and its misinterpretation of *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), warrant certiorari and reversal.

I. Nicaragua Fails to Reconcile the Circuit Split Created by the Ninth Circuit's Improper De Novo Review of Factual Findings

Under the Federal Arbitration Act, 9 U.S.C. § 4, any doubt as to "the making of [an] arbitration agreement" is resolved as an issue of fact. This comports with the statutory provision by which the party alleging that there was *no* such agreement may "demand a jury trial of such issue." *Id.* Here, Petitioners did not ask for a jury, and so the factual question whether there was "an agreement to arbitrate" was resolved by the district judge.

Not surprisingly, at least *four* circuit courts that have addressed this point have interpreted 9 U.S.C. § 4 to mean precisely what it says. The Third Circuit in *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980), the Second Circuit in *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 523 F.2d 527 (2d Cir. 1975), *cert. den.*, 423 U.S. 1054 (1976), the Eighth Circuit in *Nordin v. Nutri/System, Inc.*, 897 F.2d 339 (8th Cir. 1990),[2] and the Eleventh Circuit in *Seaboard Coast Line R.R. Co. v. Trailer Train Co.*, 690 F.2d 1343 (11th Cir. 1982), all have held that factual determinations made by a trial court in the course of reaching a decision

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[2] *See also Marshall v. Green Giant Co.*, 942 F.2d 539, 548 (8th Cir. 1991) ("when reviewing the district court's factual findings [disposing of a motion to stay pending arbitration], we apply the same clearly erroneous standard that is applied when reviewing the court's findings after a bench trial").

about arbitrability are to be reviewed only for clear error, and not *de novo*.

Nicaragua makes only a half-hearted effort to reconcile these cases with the panel's decision. Its attempt to distinguish *Par-Knit*, for example, is limited to the following: "In [*Par-Knit*], appellants argued that the individual executing the contracts at issue lacked the authority to bind the corporation." Nic. Br. at 28. But this is a factual distinction without a difference. Nicaragua never addresses the *Par-Knit* holding that "[i]f there is doubt about whether such an agreement [to arbitrate] exists, the matter . . . should be submitted to a jury." 636 F.2d at 54.

Nicaragua also never even mentions *Nordin* or *Seaboard*. It is therefore somewhat disingenuous for Nicaragua to describe *Interocean* as "[t]he only case cited by Petitioners as purportedly representing" a split between the circuits. Nic. Br. at 15 n.9. And even *Interocean* is inadequately distinguished. The Second Circuit held there that a dispute over "whether there was a meeting of the minds" on essential terms of a contract apparently containing an arbitration clause is a question of fact, subject to the "clearly erroneous" standard of review. 523 F.2d at 534. The Second Circuit did not apply the clear-error standard because of the absence of signatures on documents, as Nicaragua implies, but instead, as here, because the district court properly entered *factual* findings on whether there had ever been a meeting of the minds.

Thus the Circuits aligned with Petitioners' position on the proper standard of review of determinations of arbitrability under 9 U.S.C. § 4 include the Second, the Third, the Eighth, the Eleventh, . . . *and the Ninth*. The Ninth Circuit in *United States v. City of Twin Falls*, 806 F.2d 862 (9th Cir. 1986), *cert. den.*, 482 U.S. 914 (1987), another case never addressed by

Nicaragua, expressly held that a trial court's factual findings about what parties mean by ambiguous contract language are not to be overturned on appeal unless clearly erroneous. 806 F.2d at 869. As with *Par-Knit*, *Nordin*, and *Seaboard*, Nicaragua makes no effort to distinguish or to explain *Twin Falls*, or the case upon which it relies, *Interpetrol Bermuda, Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d 992 (9th Cir. 1984).

There is, therefore, a split between the circuits—and even within the Ninth Circuit—if the panel decision is allowed to stand, which would cause troublesome and costly disputes in future cases. Nor can Nicaragua rely on "the presumption this Court has established in favor of arbitration," Nic. Br. at 15, to avoid the clear teaching of the Court that "a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648 (1986).[3]

In some parts of its Brief, Respondent appears to argue that the appellate panel did not really review the district court's factual findings *de novo*, but merely exercised its "untrammelled power to interpret written documents." *Eddy v. Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947), *cert. den.*, 333 U.S. 845 (1948).[4] But it is clear that this is not what happened.

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[3] *AT&T* is yet another case not so much as cited in Nicaragua's Brief.

[4] Nicaragua refers the Court to Judge Learned Hand's words in *Eddy* embedded in a reference to *Network Publishing Corp. v. Shapiro*, 895 F.2d 97, 99 (2d Cir. 1990). Nicaragua neglects, however, to reproduce the next sentence of the *Network* opinion: "On the other hand, the district court's findings regarding extrinsic evidence and credibility determinations are in the nature

The district court, having found the language of the Memorandum of Intent to be ambiguous (a conclusion endorsed by the circuit, *see* 937 F.2d at 473, 476, Petition for Certiorari ("Pet.") at 9a, 16a), had to rely upon extrinsic evidence to guide its construction. The court did what the statute commanded: it held an evidentiary hearing, listened to (and observed) witnesses, and reviewed documentary evidence. It then opined on the credibility of the witnesses it heard and on the meaning of the documents it considered. And it resolved disputes as to all of those matters in favor of Petitioners.

The Ninth Circuit did not camouflage its *de novo* review: it openly disagreed with the trial judge about the relevance and meaning of exhibits, the credibility of witnesses, and the significance of the parties' behavior after the Memorandum was signed and after the dispute underlying this lawsuit began.[5]

None of the cases string-cited by Nicaragua, Nic. Br. at 14-15, stands for the proposition that a trial court's factual determinations of whether an agree-

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of findings of fact . . . and therefore subject to 'clear error' review under Federal Rule of Civil Procedure 52(a)." *Id.* (citation omitted).

[5] For example, the trial judge found that Nicaragua's failure for four years to seek arbitration was evidence of its belief that no arbitration clause existed. Findings of Fact ¶ 67; Pet. at 42a. The panel disagreed. 937 F.2d at 479; Pet. at 22a. The judge credited the testimony of the Memorandum's draftsman (and his Nicaraguan counterpart) as to what was intended by ambiguous provisions. Findings of Fact ¶¶ 57, 69; Pet. at 39a, 42a. Again, the panel substituted its own view. 937 F.2d at 473, 476; Pet. at 10a, 16a. The panel accused the district court of "disregard[ing]" the evidentiary value of a letter that was an exhibit at trial. 973 F.2d at 473; Pet. at 10a. The list goes on: the panel opinion is repiete with such appellate judgments of the witnesses and evidence.

ment exists are subject to such *de novo* review. In *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 121 (2d Cir. 1991), for example, the parties agreed that their binding contract contained a valid arbitration clause. The matter reviewed *de novo* by the court of appeals was the *scope* of the clause: whether Shearson was required to arbitrate a claim that it argued was not covered by its language. But *scope* was not the principal issue before the Ninth Circuit in this case.

Wagoner relies upon *Genesco, Inc. v. T. Kakiuchi and Co.*, 815 F.2d 840, 844 (2d Cir. 1987), for the proposition that the scope of an arbitration agreement is only one of four matters a court must determine in ruling on a motion to compel arbitration. The first is "whether the parties agreed to arbitrate." *Id.* In *Genesco*, the trial court found that the parties had so agreed, and the Second Circuit found "no reason to disturb *this factual finding*." 815 F.2d at 845 (emphasis added). Thus, *Genesco* too supports Petitioners' view.

Petitioners' argument in the district court was identical to the contention in *Genesco*: both denied that they agreed to arbitrate anything. The trial court, after reviewing exhibits and taking testimony, agreed: "the Memorandum of Intent does not contain a present agreement among the signatories to submit to arbitration, but rather contains a provision declaring the expectations of the parties that contracts to be negotiated later would include agreements to arbitrate." Findings of Fact ¶ 65; Pet. at 41a. This finding was *factual*,[6] just as the finding in *Genesco* that the parties had agreed was factual.

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[6] The trial court additionally concluded that Paragraph IV of the Memorandum did not "evidence[ ] a present agreement to

Nicaragua's theory, conflating all grounds for ordering or denying arbitrability into legal questions of interpretation, would write 9 U.S.C. § 4 out of the statute book. In contravention of the statutory mandate, and in contradiction to the holdings of other circuits, the Ninth Circuit has accepted that theory.

For these reasons, the decision below should be reviewed and reversed on the question of standard of review.

II. Nicaragua Perpetuates the Ninth Circuit's Misreading of This Court's Precedents.

The Ninth Circuit correctly cited *Prima Paint* for the proposition that "courts may not consider challenges to a contract's validity or enforceability as defenses against arbitration." 937 F.2d at 476; Pet. at 15a. But Judge Vukasin did not violate that stricture. He did not opine that a contract was invalid or unenforceable. Rather, he held that there was no contract at all—that the parties never intended to be bound. That factual determination, derived from all of the evidence, is not foreclosed by *Prima Paint*.

The panel's error is most evident in this sentence, which appears in the context of discussing a case, *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1990), said to be in "accord" with *Prima Paint*:

> [W]here the parties admit to signing *a document* that contains an arbitration provision, as here and in *Teledyne*, all questions regarding breach of *the agreement* must be referred to arbitration.

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arbitrate certain disputes," Findings ¶ 64, Pet. at 41a, and moreover that, even if there was an agreement, this dispute was outside its scope. Findings ¶ 68, Pet. at 42a.

937 F.2d at 477; Pet. at 18a (emphasis added).

But "a document"—even a "signed" document—is not the same as an "agreement."[7] Whether a document in fact codifies or enshrines an agreement is a question of fact that must be resolved before any dispute under it can be referred to arbitration.[8]

Invoking "severability" as the sole canon of contract interpretation is not a mandate of the *Prima Paint* Court. *Prima Paint* does not require that a court sitting pursuant to 9 U.S.C. § 4 decline to hear anything but evidence of how the word "arbitration" came to be included in the signed document before it. Rather, the trial court must, under 9 U.S.C. § 4, determine whether "an agreement for arbitration was made." Without this threshold decision, denying judicial resolution of the dispute would violate what this Court called in *AT&T* "first principle" of arbitration.[9]

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[7] As noted in *Interocean*, even when there is a signed document, "[w]hether there was a meeting of the minds is a question of fact." 523 F.2d at 534.

[8] In any event, *Teledyne*'s narrow holding concerns *waiver* of the right to arbitrate, an issue that has never been advanced in this case. In *Teledyne*, the party seeking arbitration denied the validity of the contract, and the party resisting arbitration asserted that such an attack waived the right to seek arbitration under the contract. The Ninth Circuit quite properly construed *Prima Paint* as designed to avoid the "absurd result" of seeking judicial relief under a contract which, if valid, contained a valid arbitration clause that would deprive the federal court of jurisdiction. 892 F.2d at 1410. No such absurdity infects judicial resolution of the dispositive issue in this case. Here, as in *Three Valleys Municipal Water District v. E.F. Hutton and Co.*, 925 F.2d 1136 (9th Cir. 1991), Petitioners "deny the *existence* of the contracts containing the arbitration provisions," and thus the existence of any arbitration agreement. *Id.* at 1142 (emphasis added).

[9] *See* p. 4, *supra*.

"The mere execution of a document . . . does not negate the factual assertion that such a signature was not intended to represent a contractual undertaking." *Par-Knit*, 636 F.2d at 54-55. Petitioners, before the trial court, made such a factual assertion, and the judge credited it. The doctrine of "severability" cannot mean that the factual inquiry directed by *Par-Knit* must be limited to locating "a contractual undertaking" only *to arbitrate*. As one district court phrased the point, "something can be severed only from something else that exists." *Pollux Marine Agencies, Inc. v. Louis Dreyfus Corp.*, 455 F. Supp. 211, 217 (S.D.N.Y. 1978). Whether there was a contract at all is a legitimate inquiry, and it differs in principle from the question, addressed in *Prima Paint*, whether the contract was valid.

Nicaragua repeatedly suggests that Petitioners urged or that the district court held that the Memorandum of Intent was "invalid." They mischaracterize Petitioners' argument as contending that "the district court was required to determine the validity of the Memorandum," *see, e.g.*, Nic. Br. at 22, a position they consider foreclosed by *Prima Paint*. But that is not what Petitioners urged, and it is not what the district court did after its evidentiary hearing. The court found—as a fact—that "the Memorandum reflected a mere agreement to agree. The Memorandum of Intent was not a contract under which disputes must be submitted to arbitration." Findings of Fact, ¶ 63, Pet. at 41a.

That is, the district court found that there was never a contract and hence no agreement to arbitrate. The court carried out loyally its responsibility under 9 U.S.C. § 4, and it did so without exceeding the limits imposed by this Court in *Prima Paint*. It was the Ninth Circuit panel which erred in its reading of

that decision, rendering it virtually inevitable that any document, however preliminary or tentative, that uses the word "arbitration" will be held to bind parties to arbitrate, no matter what their intent, and no matter how clearly they expressed it.

Conclusion

Petitioners acknowledge the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). But that policy must have outer limits. This Court has recognized in *AT&T* and other cases[10] that arbitration is ultimately a matter of contractual choice. Here, the trial court sitting as a finder of fact found that there was no contract and hence no agreement to arbitrate. That factual finding was not clearly erroneous, nor did it exceed the limits laid down in *Prima Paint*.

Since the decision of the Ninth Circuit conflicts with numerous opinions of other circuits, and deviates from binding precedents of this Court, it should be reviewed by writ of certiorari, and reversed.

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[10] *E.g.*, *Perry v. Thomas*, 482 U.S. 483, 489 (1987), cited by the panel, 937 F.2d at 475, Pet. at 13a, which notes that arbitration cannot be required if "the agreement to arbitrate is not part of a contract evidencing interstate commerce."

Respectfully submitted,

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